72-156

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO.

SUPREME COURT, U.S.
FILED
JUL 27 1972
MICHAEL RODAK, JR., CLERK

JUAN POMPA ZARATE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

--- 72-156

PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

MORRIS LAVINE
215 West 7th Street
Suite 620
Los Angeles, California
90014
(213) 627-3241
Morris Lavine
Attorney for Petitioner

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Juan Pompa Zarate, respectfully petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a conviction and sentence of the petitioner to 15 years imprisonment for alleged conspiracy to smuggle marijuana and amphetamines and barbiturates into the United States. The cases against the alleged smugglers, who became witnesses for the government, were dismissed shortly after the conviction of the petitioner in spite of their denials that they had

been promised any consideration for their testimony or that they would be totally freed while the defendant was being given 15 years.

The prosecutor failed to make any disclosure to court or counsel during the trial.

A jury of 11 convicted the defendant without a written waiver or consent by the defendant or his counsel.

Not a single leaf of marijuana was found at any time in the possession of the defendant nor were any amphetamines or barbiturates, nor did any expert testify regarding the same. Without the consent of the defendants, the attorneys for the defendants and the prosecutor stipulated to exhibits never produced in court and virtually pled the defendant guilty without his consent.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The decision of the Court of Appeals was rendered May 8, 1972. A petition for rehearing was duly filed and denied June 30, 1972. Leave to file a second petition for rehearing was denied July 18, 1972.

The defendant is incarcerated in the federal prison at Steilacoom, Washington and has been confined since May 23, 1971. The trial court fixed bond on appeal in the sum of $50,000 cash or corporate surety, neither of which the petitioner has been able to furnish.

OPINION BELOW

The opinion below is attached hereto as Appendix A. Petitioner believes that the printed opinion in the official reports has not been published as yet.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 21, Section 176a, U.S.C.; Title 18, Section 371 and Section 545; Title 18, Section 2.

Rule 23(b), Federal Rules of Criminal Procedure.

Fifth Amendment and Sixth Amendment, U.S. Constitution.

THE FACTS

Juan Pompa Zarate is a Mexican citizen living in the United States for several years. On June 20, 1969 John Henry Garcia was arrested by Immigration authorities at the San Clemente checkpoint of the Immigration. He was accompanied by Albert Vasquez. He had concealed in his vehicle, according to his testimony in the trial, close to a half million pills. He didn't know the proper name for them but they were called "uppers" and "downers", amphetamine and benzedriene.

He had met the petitioner about five or six months before somewhere in Tijuana, Mexico. He believes it was at the home of a man named Pablo. He said he had occasion prior to his arrest to go to Pablo Uvalle's residence in Tijuana in company with petitioner.

The witness claimed petitioner was endeavoring to purchase marijuana and that there came a time when he drove a load back to Zarate from Pablo.

The first occasion, he said, was pills. He was not sure there was any marijuana. He said there were two occasions when he drove cars to Los Angeles and told petitioner that he could pick up the car. There came a time when he and Dorve Robert Croft went to Mexico together, which was three months prior to his arrest. He claimed to have had a talk with petitioner regarding "grass", which the witness interpreted to be marijuana. He said that he saw Croft arrested as he was attempting to cross the Border at Mexicali. He said petitioner was supposed to have helped him out financially to get an attorney but did not do so and petitioner denied that the load was his.

On cross-examination the witness was asked "What promises were made to you for testifying, coming in here and testifying?" He replied "The only promise that I have had up to this point was that the Judge, they would make recommendations to the Judge that I have cooperated...."

"Q. And isn't it true that you were told that if you cooperated that the people would make a motion to withdraw your plea of guilty and dismiss the case against you?"

"A. No sir, they did not."

Nevertheless, after the conviction

and sentence of petitioner, the case against the witness was dismissed.

Dorve Robert Croft was arrested at the port of entry, Calexico, on or about March 16, 1969. He had been in company with John Garcia. Garcia had got out of the car and walked across the Border and he drove the car across. There was merchandise in the car which he had learned was partly marijuana and he was told by one of the agents, amphetamine tablets. He never saw any of it. He had met petitioner about three weeks before in Tijuana. He wasn't introduced to him. Sometime after his arrest he observed petitioner in an automobile in East Los Angeles -- no, Montebello. He followed petitioner to his home address and got the house number and street and called up agent Kane (Immigration Agent). He dialed petitioner's telephone number and from a public phone booth in the City of Alhambra. Agent Kane listened in on the conversation.

In the conversation the witness said he identified himself on the phone as Red and that his hair was a little on the red side. Then he said he told petitioner on the telephone, while Kane was listening, "You remember about a year ago I brought across a car, across the Border for you and I got in a lot of trouble over it, now I need money for a lawyer to help me out of this trouble. He said something like 'You wasn't working for me.' I said 'Yes, I was.' I said 'I hear' -- I asked him for money; he said he didn't have any. I said, 'That is not what I hear. I hear you are doing all right.' He said,

'No, I am not. Haven't been doing anything lately.' I said, 'That is not what I hear.'..."

On cross-examination the witness said that the understanding "between myself and Pablo that if anything happened on my way across the Border that Pablo and Zarate would get me a lawyer and pay my bill and get me out of jail. So this did happen. So I was in jail for three and a half weeks and I kind of changed my attitude."

"Q. So that is why you want to get even with Mr. Zarate, huh?"

"A. You might say that."

Asked if it wasn't a fact that he didn't make any conversation or calls to Mr. Zarate until about April 3, 1970, he said that was right.

"That was better than a year after you were arrested?"

"That's right."

He said he was charged with smuggling but that the government has not offered him anything. Nevertheless, his case was also dismissed after the conviction and sentence of petitioner. He admitted he had never talked to petitioner about bringing anything over across the Border.

The witness admitted he lied and made up a story for the police or Customs agents when they stopped him and that he was going to raise his right hand and say he was going to tell the truth and

come out with this pack of lies. The witness said the government hadn't promised him a thing. He said he had no idea whether the case against him would be dismissed, yet the prosecutor definitely intended to dismiss the case but did not make this known either to the petitioner or his counsel.

Robert E. Waggoner testified he was arrested coming back in from Mexico at the International Border. He was coming in from Tijuana. He had some contraband in his car. The witness was put on the stand to testify that Pablo's trade or occupation was in Mexico and was permitted to testify that Pablo was a smuggler from a point in Mexico to a point to persons unknown to the United States.

On cross-examination he testified that no one told him that they would dismiss the charges against him or work out a lesser offense or sentence, yet his case was also dismissed after the sentence of petitioner.

Shortly after the selection of the jury, one of the jury women was late and the court discussed in chambers proceeding with 11 jurors if she did not show up. This appeared agreeable in reference to the situation as it then existed but on a second occasion, on April 22, 1971 the jury woman did not show up promptly at the morning session and the court then proceeded with 11 jurors based on the proceeding discussion in chambers. No written consent of the petitioner and his attorney, as required by Rule 23(b), was secured and the trial then proceeded with only

11 jurors.

The prosecutor brought out in the trial that the petitioner was a Mexican citizen, although not in any way an issue in the case.

The prosecutor and defense counsel entered into a stipulation without the presence of the exhibits alleged to contain marijuana and amphetamines. (R.T. 81-83) The exhibits were numbered 1A through 11, (R.T. 181) and 2A, 2B and 2C alleged to have contained amphetamine tablets and seconal capsules. The stipulation entered into by the Assistant United States Attorney and defense counsel was not approved by petitioner nor was it waived, (R.T. 182-183) resulting in the admission of the exhibits in evidence without proof of the matter and without cross-examination of any witness.

The prosecutor failed to call to the attention of the court and jury his intention to dismiss the cases against the principal offenders in the case after they had become witnesses for the government against petitioner, thus denying defense counsel the right to test their credibility and lack of credibility in their testimony.

The effect of the stipulation as to the marijuana, amphetamines and seconal was in effect a plea of guilty on behalf of petitioner. There was no consent.

Petitioner was sentenced to a total of 15 years in prison.

The original indictment was in seven counts and these counts included other

persons not connected in any way in either the indictment or the evidence with the petitioner.

Count One charged petitioner with conspiracy beginning at an unknown date up to and including the 29th day of April, 1970 with several named persons to violate Title 21, Section 176a, to-wit, an intent to defraud the United States by importing and bringing into the United States marijuana and to receive, conceal and sell and facilitate the sale of marijuana after being brought into the United States contrary to law.

The first count sets forth overt acts 1 and 2, but in connection with those overt acts the Court struck out overt act 2 on page 2 of the Clerk's transcript from lines 18 through 20.

Overt act 1 alleges that on March 16, 1969 defendant Dorve Robert Croft entered the United States from Mexico in an automobile that contained approximately 106 pounds of marijuana. No overt act is charged in this count as against petitioner.

The second overt act, which was stricken, related to a defendant Robert E. Waggoner.

Count Two of the indictment alleges a conspiracy to violate Section 545 of Title 18 to smuggle and clandestinely introduce into the United States from Mexico certain merchandise, to-wit, amphetamine tablets and seconal tablets, contrary to Title 19, U.S.Codes, Chapter 4.

The overt acts charged in the second count related to March 16, 1969 in paragraph 1, relating to Dorve Robert Croft, alleging that Croft entered the United States in an automobile containing 20,000 amphetamine tablets.

Paragraph 2 was stricken.

Paragraph 3 charged that one John Henry Garcia entered the United States with 450,000 seconal tablets.

Appellant is not mentioned in any of the overt acts in Count Two.

Count Three alleges that on March 16, 1969 Dorve Robert Croft, with intent to defraud the United States, smuggled 106 pounds of marijuana into the United States which should have been declared and alleges that the defendant Juan Pompa Zarate, petitioner herin, knowingly aided and abetted and assisted, counseled and induced the alleged offense in violation of Title 18, Section 2. The offense being charged therein was a violation of Title 21, Section 176a.

Count Four alleged that Croft, on the same day, March 16, 1969, smuggled 20,000 amphetamine tablets into the United States and did not present them for inspection, in violation of Title 18, Section 545, and that defendant (petitioner) Zarate aided and abetted, in violation of Title 18, Section 2.

The indictment appears, in pertinent part, from pages 1 to 5 of the Clerk's transcript.

Petitioner's counsel, who, from his

name to be of the same nationality, made a motion for a bill of particulars which came up at the date of trial. The Judge ordered a bill of particulars as follows:

> "All right. The order on the Bill of Particulars will be as follows, and I suggest that you take this down:
>
> "Items 1 through 11, which apply to Count 1, and Items 12 through 19, which apply to Count 2:
>
> "The Government is ordered to state all the overt acts in furtherance of the conspiracies, including the places and times when the overt acts were performed and the names of all the persons who were present or took part in the overt acts upon which the Government intends to rely in this trial. ..."

The court denied requests for a bill of particulars in other respects. (R.T. 16-17a)

No bill of particulars was ever furnished. The prosecutor said he had a witness in his office and would let defense counsel talk to the witness, whose name was Juan Garcia. The court then said: "The government has satisfied the burden placed upon them to furnish you, perhaps not directly but certainly indirectly, what amounts to a bill of particulars." (R.T. 17g)

The prosecution's case was based upon the testimony of three alleged

accomplices who were stopped at the Border and who attempted to and were successful in shifting their admitted crime to the petitioner. There was no corroboration. California law itself would not permit such a conviction to stand.

During the course of the trial the court told the jury that: "During the course of the trial you may wonder why some witnesses have not been called or some exhibits not produced. You are instructed that neither the Government nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence or who may have been determined to have more knowledge of the matters in question nor is either party required to produce all exhibits referred to in the testimony." (R.T. 13)

The government never did produce for the examination of the petitioner any marijuana, amphetamines or seconal tablets, nor did the government produce any chemist or expert to testify to the same.

A stipulation was obtained by the prosecutor from the Spanish defense attorney, without the consent of the defendant, as to what the exhibits would contain and without any foundation or proof that the exhibits did contain marijuana, amphetamines or seconal. (R.T. 181-183)

The stipulation was in effect a plea of guilty on behalf of the petitioner without his consent. It was an alleged confession by his attorney without his knowledge or consent of the very corpus

delicti of the case.

The alleged violation occurred March 16, 1969. Petitioner was not apprehended until 1970 and a hearing was set on June 16, 1970 for arraignment and plea, at which time petitioner pleaded not guilty. His trial did not commence until April 21, 1971 and extended through April 23, 1971, thus more than a year elapsed between arraignment and trial and petitioner was denied speedy trial guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

The court struck certain portions of the indictment without resubmitting the indictment to the grand jury in violation of the Fifth Amendment to the Constitution of the United States so that the indictment was no longer the indictment of the grand jury but one that was amended by the court and the prosecutor.

QUESTIONS PRESENTED

1. Whether the evidence of three alleged accomplices, without corroboration, who shifted their acts to petitioner, is sufficient to justify the verdicts either as a principal or an aider and abettor.

2. Whether an indictment which is amended by the court and prosecutor and on which the defendant is thereafter tried, violates the Fifth Amendment to the Constitution of the United States and is no longer the indictment of the grand jury.

3. Whether the prosecution has the burden of proof of bringing in any exhibits and producing expert testimony subject to cross-examination and confrontation of the defendant, without which the government has failed to meet its burden of proof as to the contents or alleged contents of the alleged exhibits.

4. Whether petitioner was denied Sixth Amendment rights of confrontation by the failure of the prosecution to bring in witnesses who could establish or fail to establish the petitioner's innocence or guilt.

5. Whether the indictment, as amended, was no longer the indictment of the grand jury and therefore entitled petitioner to judgments of acquittal.

6. Whether the judgments, and each of them, are void for non-compliance with Rule 23(b), F.R.C.P. where the verdicts were rendered by a jury of 11 without the written consent of petitioner or his counsel.

7. Whether the jury verdict by a jury of 11, after excusing the juror, placed petitioner once in jeopardy and was in violation of the Fifth Amendment and entitled him to a dismissal.

8. Whether the petitioner was denied speedy trial guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

9. Whether the failure to furnish petitioner with a bill of particulars as requested and ordered denied him due process of law guaranteed by the Fifth

Amendment to the Constitution of the United States.

10. Whether the court erred in splitting the indictment charging the same type of crime but involving subject matters that should have been consolidated into a single count.

11. Whether the evidence was insufficient to justify the verdicts and whether the verdicts are contrary to the law and the evidence.

12. Whether petitioner, a Mexican citizen, was denied fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

13. Whether petitioner, a Mexican citizen, was denied the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

14. Whether petitioner was incompetently represented in the trial and whether the trial became a mere sham, resulting in his unfair conviction.

15. Whether the court erred in instructing the jury that it was not necessary to produce all the witnesses where the prosecution failed to produce any expert to testify as to any marijuana, amphetamines or seconal.

16. Whether the verdicts are contrary to the law and the evidence.

17. Whether the prosecutor was guilty of such prejudicial misconduct as to deny petitioner the right of cross-

examination where defendants denied they were promised anything with reference to dismissing their cases and the prosecutor must have known this was false and dismissed their cases subsequent to petitioner's trial.

18. Whether the government's use of a co-defendant to use the telephone with Immigration Agent Kane listening, without any warning or notice to petitioner, violated Title 47, Sec. 605, U.S.C., Katz v. U.S., 389 US 347, 19 L.ed.2d 516, and Massiah v. U.S., 377 US 201, 12 L.ed.2d 246.

REASONS FOR GRANTING THE WRIT

I

It is important for this Court to hear and determine what is substantial evidence and whether the uncorroborated, contradictory, contradicted testimony of a confessed criminal or criminals, who admit falsification but are induced by hope of immunity to testify that the accused, who was not present when these accomplices committed the crimes, constitutes substantial evidence which will sustain a conviction.

To constitute substantial evidence, in which the life or personal liberty of the defendant is at stake, other evidence than that of an accomplice or perpetrator is essential to convict.

It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a

crime. "It is undoubtedly the better practice," says the Supreme Court, "for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." (Holmgren v. U.S., 217 US 509, 523, 524, 30 Sup.Ct. 588, 592, 54 L.ed. 861, 19 Ann.Cas. 778) And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by himself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of his crime, is not only insufficient to establish his guilty beyond a reasonable doubt, but that it presents no substantial evidence of it. (Jahnke v. State, 68 Neb. 154, 104 NW 154, 158)

Sykes v. U.S., 204 F. 909

Petitioner in this case may not be lawfully deprived of his liberty for 15 years without proof of his guilty beyond a reasonable doubt much less without any substantial evidence of it, and this Court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice.

Sykes v. U.S., 204 F. 909

II

The prosecutor and defense counsel entered into a stipulation without the presence of the exhibits alleged to contain marijuana, amphetamines and seconal.

(R.T. 81-83) The exhibits were numbered 1A through 1I (R.T. 181) and exhibits 2A, 2B and 2C alleged to have contained amphetamine tablets and seconal capsules. The stipulation entered into by the Assistant United States Attorney and defense counsel was not approved by petitioner nor was it waived (R.T. 182-183), resulting in the admission of the exhibits in evidence without proof of the matter and without cross-examination of any witness.

The effect of the stipulation as to the marijuana, amphetamines and seconal was in effect a plea of guilty on behalf of the petitioner, even though not consented to by petitioner. As stated in People v. Davis, 48 Cal.2d 241, 256, the Court said:

> "Whatever trial strategy or tactics an attorney may employ in the defense of an accused he may not enter a plea of guilty to a felony without the consent of his client. (Pen.Code, Sec. 1018.) It is a violation of his duty of fidelity to his client to assume a position adverse or antagonistic to him without the latter's free and intelligent consent after full knowledge of all the facts and circumstances.' (Anderson v. Eaton, 211 Cal. 113, 116 [293 P. 788].) This consent was not given. Without such consent an attorney may not surrender any substantial right of the accused. (Hoagland v. Chargin, 134 Cal.App.2d 466, 474 [286 P.2d 931]; Redsted v. Weiss, 71 Cal. App.2d 660, 663 [163 P.2d 105] nor may he impair, compromise or destroy his client's cause of action.

(Zurich General Acc. & Liab. Ins. Co., Ltd. v. Kinsler, 12 Cal.2d 98, 105 [81 P.2d 9312, citing with approval Price v. McComish, 22 Cal.App.2d 92 [70 P.2d 978]; Witaschek v. Witaschek, 56 Cal. App.2d 277, 283 [132 P.2d 600].)"

In People v. Rogers, 56 Cal.2d 301, the Court said:

"Where defendant in a murder case entered a plea of not guilty and waived a jury trial, a stipulation entered into by defendant's counsel and the prosecuting attorney that the court would be restricted to a finding either of second degree murder or of manslaughter in substance necessarily had the same effect as a plea of guilty entered by an attorney for his client since it purported to eliminate from the trial the question of defendant's innocence. Where the trial judge, who was also the trier of fact, abided by the stipulation whether because he felt absolutely bound thereby or because he voluntarily acted pursuant thereto, defendant was denied the presumption of innocence, which remains with him throughout the trial and is removed only by a finding of guilt.

***

"In solving the problem as to what constitutes a defendant's plea as 'his own,' we are aided by the case of People v. Holmes, 54 Cal.

2d 442 [5 Cal.Rptr. 871, 353 P. 2d 583], wherein the court was concerned with an analogous situation involving the waiver of the constitutional right to trial by jury, which waiver is required to be 'expressed in open court by the defendant and his counsel.' (Const., art. I, Sec. 7.) It appeared that the defendant there, as in the instant case, did not expressly join in the statements made by his counsel in open court, although being present in court and offering no objection to the proceedings. The court held that the waiver must be expressed 'and will not be implied from a defendant's conduct. (Citations.)' The court continued at page 444: 'Experience has shown that there is sound reason for this requirement. If the waiver were left to implication from conduct, there would be a danger of misinterpretation with respect to a right the importance of which requires there be certainty.' Manifestly the entry of a plea in a prosecution for a felony cannot be said to be less important than the waiver of trial by jury. The record in the instant case reveals no express authorization by the accused to his counsel for either the withdrawal of his plea of not guilty or the adoption of the stipulation that the defendant was guilty of murder of the second degree or manslaughter. Since the waiver of a right so important cannot be left to

implication the defendant cannot be said to have authorized the stipulation agreed to by counsel, and the judgment in the instant case must be held to be invalid." (56 Cal.2d 307)

III

The prosecutor failed to call to the attention of the court and jury his intention to dismiss the cases against the principal offenders in the case after they had become witnesses for the government against petitioner, thus denying defense counsel the right to test their credibility and lack of credibility in their testimony.

The prosecutor had a duty to disclose to the court and counsel that he expected to dismiss the cases against the principal offenders, who were the principal witnesses in the case. They had denied that there was any agreement or understanding with them as to their cases. Nevertheless, this was not the truth.

Giglio v. U.S., 31 L.ed.2d 104, decided February 12, 1972, holds that nondisclosure of evidence affecting the co-conspirator's credibility violates due process of law and justifies a new trial, irrespective of the government's good faith or bad faith.

Also see:

Brady v. Maryland, 373 US 83, 10 L.ed.2d 215

Napue v. Illinois, 360 US 264,

IV

The judgments, and each of them, are void for non-compliance with Rule 23(b), Federal Rules of Criminal Procedure. The verdicts were rendered by a jury of 11 without the written consent of petitioner or his counsel.

Due process requires that the Rules of Criminal Procedure be followed. The mere tardiness of a juror is no excuse for reducing the jury to 11 and requires a reversal of the judgment. Jeopardy has set in.

People v. Young, 100 Cal.App. 18, holds that when the jury has been completed and regularly empanelled and sworn, jeopardy has attached and the discharge of a single juror places the defendant in jeopardy.

Patton v. U.S., 281 US 276, 74 L.ed. 854, holds that a jury of 12 men, neither more nor less, is required under the common law.

In U.S. v. Virginia Erection Corp., 335 F.2d 868, 873, the court, in granting a new trial, said: "Under Rule 23(b) the Court might have secured the written stipulation of the party to a jury of less than twelve...We deem it most unwise to place the judicial stamp of approval upon this attempt of Court and counsel to circumvent the established rule and to substitute unauthorized procedures."

V

Petitioner was denied speedy trial

guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

Petitioner was indicted April 29, 1970. (C.T. 1) He was arraigned and pled June 16, 1970. (C.T. 9) He had an omnibus hearing July 23, 1970 at 10 a.m. (C. T. 10) He filed a motion for bill of particulars August 6, 1970 and the court set November 9, 1970 for hearing on motions. Trial did not start until April 21, 1971, continuing on April 22 and 23, 1971.

The long delay was highly prejudicial and violated petitioner's Sixth Amendment rights. (Klopfer v. North Carolina, 386 US 213, 18 L.ed.2d 1, 8; People v. Fegelman, 66 Cal.App.2d 950, 954; Dickey v. Florida, 398 US 30, 37, 38, 26 L.ed.2d 26, 32)

VI

The District Court erred in failing to compel the government to supply a bill of particulars requested by petitioner in five pages (C.T. 13-17) on August 6, 1970, but never furnished. (Glasser v. U.S., 315 US 60; Roth v. U.S., 315 US 827, 86 L.ed. 1222; Rule 7(f), F.R.C.P.; U.S. v. Rosenfeld, 264 F.Supp. 760; U.S. v. Yoffe, 52 F.Supp. 175; U.S. v. Palmisano, 273 F.Supp. 750)

Since no bill of particulars was furnished as ordered petitioner was forced to trial without due process of law since he was denied notice and an opportunity to be heard. (In re Gault, 387 US 1, 18 L.ed.2d 527, fn. 53; In re Oliver, 333 US 257, 273; Cole v. Arkansas, 333 US 196)

VII

It is important that this Court hear this case to determine whether the government can split a charge into four separate counts, causing petitioner to be multiply charged with the same or similar transactions. (People v. Stephens, 79 Cal. 428)

As said in People v. Stephens:

"The essential element of the offense was the same act in both cases. In Regina v. Erlington, 9 Cox C.C. 86, Cockburn, C.J., said: 'It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.'

***

"The law does not permit a single individual act to be divided, so as to make out of it two distinct indictable offenses. (Drake v. State, 60 Ala. 43.)"

VIII

During the cross-examination of Garcia, he was asked whether he pled guilty to one count of conspiracy (to smuggle). (R.T. 48) Later in the cross-examination he was asked: "Have you ever been convicted of a felony?"

"A. No, sir." (R.T. 50)

This went directly to the witness' credibility which petitioner had a right to impeach. It was the duty of the prosecutor to tell the court and jury that

this statement was untrue and that a plea of guilty to a conspiracy to smuggle is a felony. (Napue v. Illinois, 360 US 264, 3 L.ed.2d 1217; Berger v. U.S., 295 US 78, 79 L.ed. 1314; Viereck v. U.S., 318 US 236, 87 L.ed. 734)

IX

The prosecutor asked prejudicial questions on cross-examination. He asked petitioner if he was a citizen of Mexico (R.T. 212-213) and demanded to see papers to permit him to remain within the United States and objections that it was immaterial and irrelevant were overruled by the court. This was highly prejudicial to the defendant before the jury and denied him fair trial and equal protection of the laws guaranteed by the due process clause of the Fifth Amendment.

X

The indictment, in Counts One and Two, was altered by striking out Overt Act 1 in Count One and Overt Acts 2 and 4 in Count Two. The alterations voided those counts in the indictment as the indictment, as returned by the grand jury, was no longer the indictment before the court and jury.

Ex parte Bain, 121 US 1, 30 L. ed. 849, 853

Russell v. U.S., 369 US 749, 8 L. ed.2d 240

To permit a trial on an indictment that has been altered is to try a defendant upon an indictment found not by a grand jury but by a judge.

A defendant in a criminal case is entitled under the Fifth Amendment to be tried by an indictment returned by the grand jury. That indictment must inform the accused of the nature and cause of the accusation.

Sixth Amendment, U.S. Constitution

U.S. v. Cruikshank, 92 US 542, 23 L.ed. 588

For all of these reasons, we respectfully submit that this Honorable Court should grant certiorari and reverse the judgments below.

Respectfully submitted,

Morris Lavine

MORRIS LAVINE

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED
Plaintiff and Appellee,	)	MAY 8 1972
vs.	)	
JUAN POMPA ZARATE,	)	NO. 71-2466
Appellant.	)	

On Appeal from the United States District Court for the Southern District of California

Before: CHAMBERS and CHOY, Circuit Judges, and CURTIS, District Judge.

Per Curiam:

The judgment of conviction in this marijuana-amphetamine tablets smuggling case is affirmed.

We have considered the more than one dozen points asserted. Although ably presented, we cannot agree with any of them.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)FILED
Plaintiff and Appellee,	)JUN 30 1972
vs.	) CLERK
JUAN POMPA ZARATE,	)No. 71-2466
Defendant and Appellant.	) ORDER

Before: CHAMBERS and CHOY, Circuit Judges, and CURTIS, District Judge.

The petition for rehearing is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee,	)	FILED JUL 18 1972 CLERK
vs.	)	
JUAN POMPA ZARATE, Defendant and Appellant.	)	NO. 71-2466

Before: CHAMBERS and CHOY, Circuit Judges, and CURTIS, District Judge.

PER CURIAM:

The petition to stay mandate is denied. If counsel has any authority that issuance of a mandate by this court prevents the seeking or granting of certiorari, he may submit it.

The petition for leave to file a second petition for rehearing is denied.

The motion for reduction in the amount of the bail is denied. The court has concluded that there is no merit in the appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-156

JUAN POMPA ZARATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1972. A petition for rehearing was denied on June 30, 1972, and, on July 18, 1972, a mo-

tion for leave to file a second petition for rehearing was denied. The petition for a writ of certiorari was filed on July 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the uncorroborated testimony of three accomplices was properly admitted, and, together with the government exhibits of marihuana, amphetamine and seconal, was sufficient evidence to support the conviction.

2. Whether the district court's failure to obtain a written consent from petitioner before permitting the trial to proceed with eleven jurors was under the circumstances reversible error.

3. Whether petitioner's representation by retained counsel was so incompetent as to constitute a violation of the Sixth Amendment.

4. Whether the indictment properly charged petitioner with aiding and abetting and with conspiracy as separate counts; whether the withdrawal by the court of part of the charge from jury consideration was an impermissible amendment of the indictment.

5. Whether the delay between arraignment and trial amounted in this case to an unconstitutional denial of a speedy trial.

6. Whether the recording by the F.B.I. of a telephone conversation between petitioner and another person, with that person's permission, violated the Fourth Amendment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner, a Mexican citizen, was convicted of aiding and abetting the illegal importation into the United States of marihuana and amphetamine tablets (Counts 1 and 2), in violation of 21 U.S.C. (1964 ed.) 176(a) and 18 U.S.C. 2 and 545, and of conspiring to commit the substantive offenses (Counts 3 and 4), in violation of 18 U.S.C. 371. He was sentenced to ten years' imprisonment on Count 1 and five years' imprisonment on Count 2, the terms to run consecutively with each other, but to run concurrently with similar sentences on Counts 3 and 4. The court of appeals affirmed *per curiam* (Pet. App. A).

At trial, the government's principal witness was John Henry Garcia. He testified that he had known petitioner for approximately six months, having met him at the home of a narcotics dealer named Pablo Uvalle in Tiajuana, Mexico (Tr. 21-22). Garcia stated that he had been present on a number of occasions when petitioner had purchased drugs from Uvalle (Tr. 23-26). Garcia further testified that he was asked by petitioner to drive a vehicle containing narcotics to Los Angeles (Tr. 27-29); he finally agreed to do so (Tr. 28); accompanied by petitioner he went to Uvalle's residence, where he was given the keys to the car, which had earlier been brought across the border (Tr. 28). Garcia then picked up the car in San Ysidro, California, and drove it to the designated location in the Los Angeles area (Tr. 29).

Garcia also implicated petitioner in the transportation of a second vehicle which Garcia had driven from San Ysidro to Los Angeles, after getting the keys from Pablo Uvalle (Tr. 30). On this occasion Garcia stated that Uvalle had told him to "[b]e sure to tell Juan [petitioner] to get the car back to him as soon as possible, because there has been a delay on his other cars" (Tr. 30). Garcia had driven this car to his residence in Los Angeles and then had telephoned petitioner, who was in the area, and advised him that "he could pick up the car" (Tr. 31-32).

Garcia's testimony further revealed that, on a number of occasions, he had transported money from petitioner to Uvalle (Tr. 55). He spoke of one instance when he had delivered approximately $2000 to Uvalle in Mexico for petitioner (Tr. 33-37); petitioner had on that occasion asked Garcia to order for him "a load of mostly grams of marijuana" (Tr. 35) through Uvalle. Garcia stated that when he placed the order, Uvalle told him he had no driver; Dorve Croft, who had accompanied Garcia to Mexico, was then hired to drive the marihuana across the border and deliver it to petitioner (Tr. 38-39, 108-110). Croft was arrested at the border (Tr. 40, 110), and when he subsequently telephoned petitioner to ask for money to hire a lawyer (Tr. 116-118), he was advised by petitioner to "go see Pablo" (Tr. 117-118, 160-161). This telephone conversation was overheard and recorded by agents of the FBI with Croft's permission (Tr. 186-188). It took place on April 3, 1970, several weeks prior to the indictment, which was returned on April 29, 1970.

Petitioner took the stand on his own behalf and denied that he had ever had any dealings in narcotics with Pablo Uvalle (Tr. 193). He testified that the numerous calls from his residence to Uvalle's telephone were actually made to Pablo's wife, with whom he claimed to be romantically involved (Tr. 196-197, 210).

ARGUMENT

1. Petitioner raises a number of objections which relate to the sufficiency and competency of the evidence.

(a) As we have summarized in the Statement, there was ample basis on the facts of this case for the jury to return a guilty verdict. Petitioner seems to suggest that, since the government's three principal witnesses were his accomplices and allegedly had an interest in shifting blame to him, their evidence either should not be considered, or, as we understand his argument, should be deemed inherently incredible. It is, however, well settled that the uncorroborated testimony of an accomplice may support a conviction. See, *e.g.*, *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *United States* v. *Williams*, 424 F.2d 1056 (C.A. 9), certiorari denied, 399 U.S. 905; *Wooten* v. *United States*, 380 F.2d 230 (C.A. 5), certiorari denied, 389 U.S. 942.

(b) Whether an accomplice's testimony is to be credited is a matter for the jury. Here, petitioner attempted on cross-examination to attack the witnesses' credibility by demonstrating that they, too,

were under prosecution. The jury chose to believe the testimony of the accomplices despite petitioner's extensive cross-examination on this point. The record does not support petitioner's conclusory allegations that promises (express or implied) were made by the government in exchange for fabricated testimony.

(c) Finally, petitioner challenges the following jury instruction given by the court (Tr. 249) :

> The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the evidence or who may appear to have some knowledge of matters in issue at this trial, nor does the law require the prosecution to produce as exhibits all papers and things mentioned in evidence.

As we understand the argument, petitioner now contends that this instruction was erroneous because the prosecution did not call expert witnesses to state whether certain government exhibits were in fact marihuana and amphetamine tablets. But expert testimony was unnecessary here; petitioner's counsel had stipulated that, "as to Exhibits 1A through 1I, if a qualified Customs Chemist were called and sworn, * * * he would testify that he has examined samples of [these exhibits], and in his opinion, they contain amphetamine tablets and seconal capsules" (Tr. 181). A similar stipulation was entered into with regard to the government's marihuana exhibits (Tr. 182). In these circumstances, neither the court nor the prosecution can be faulted for not requiring expert witnesses to take the stand.

2. Petitioner also argues that his conviction should be set aside because the district court, without his written consent, permitted the trial to proceed with eleven jurors. While Rule 23(b), Fed. R. Crim. P., calls for written consent in such a circumstance, on the record in this case petitioner should not be heard to invoke that rule, since he explicitly agreed to the eleven-man jury.

Following the luncheon recess on the first day of trial, only eleven jurors returned to the courtroom. The government attorney, after waiting approximately ten minutes, offered to proceed to trial with those jurors present. Petitioner's counsel agreed to proceed with eleven jurors if the missing juror did not return shortly. The court then addressed petitioner (Tr. 17C-17D):

> Mr. Zarate, you understand that you have a right to be tried by twelve jurors.
>
> The Defendant: Yes
>
> The Court: You may waive that right and we can go forward with eleven jurors, but you and your Counsel must agree to that. Your Counsel indicates that he is willing to proceed. The Government is willing to proceed. Do you have any objection to proceeding?
>
> The Defendant: No, sir.
>
> The Court: Are you willing to proceed with eleven jurors rather than twelve jurors?
>
> The Defendant: Yes.

The absent juror then appeared, and the trial commenced.

The following day, the same juror once again failed to appear. The record sets forth the following colloquy (Tr. 96-97):

> The Court: * * * Gentlemen, we entered into a stipulation in chambers with respect to proceeding in this matter with eleven jurors. Are you willing to continue with that stipulation? Mr. Valenzuela?
>
> Mr. Gott [Assistant U.S. Attorney]. The Government is willing.
>
> Mr. Valenzuela [Defense Counsel]: Yes, Your Honor.
>
> The Court: Mr. Zarate
>
> The Defendant: Yes, Your Honor.
>
> The Court: When she shows up, simply excuse her. The stipulation is granted; we will proceed with eleven jurors.

In view of this express consent to an eleven-man jury, the failure of the court to require petitioner's written stipulation to that effect, if technically in error, was beyond question harmless error which was not in any material way prejudicial. See *Horne* v. *United States*, 264 F.2d 40 (C.A. 5), certiorari denied, 360 U.S. 934; *Rogers* v. *United States*, 319 F.2d 5 (C.A. 7), certiorari denied, 375 U.S. 989; *Bayless* v. *United States*, 381 F.2d 67, 74-75 (C.A. 9). Compare *United States* v. *Guerrero-Peralta*, 446 F.2d 876, 877 (C.A. 9).

3. Petitioner next challenges the competency of his retained counsel, claiming that counsel improperly stipulated to the fact that the government exhibits

contained marihuana, amphetamines and seconal. The stipulation, however, simply reflects a tactical decision by defense counsel not to object to the exhibits, but to rely instead on the defense that petitioner had not participated in the smuggling scheme and had no knowledge of the narcotics. Petitioner's disagreement with his counsel's judgment and strategy on this point is not adequate ground to conclude that he had ineffective assistance of counsel. *Bruce* v. *United States*, 379 F.2d 113, 117 (C.A.D.C.). The stipulation was not, as petitioner claims (Pet. 8), equivalent to a guilty plea. It still left to be proved at trial whether petitioner had knowledge of the alleged illegal importation and, with such knowledge, did actually aid and abet others engaged in the unlawful activity. See generally *United States* v. *Dorsey*, 449 F.2d 1104, 1107-1108 (C.A.D.C.).

4. Petitioner also challenges his indictment, as erroneously charging him in a number of counts with essentially a single offense arising out of the same transaction. He also complains that the indictment was improperly amended by the trial court. Both of these arguments are insubstantial.

a. Aiding and abetting the commission of a substantive offense and conspiring to commit that offense are, contrary to petitioner's contention, two separate offenses, even though the acts comprising the substantive counts are included in the indictment as overt acts under one or more conspiracy counts. See *Pereira* v. *United States*, 347 U.S. 1, 9-12; *United States* v. *Cole*, 449 F.2d 194, 201, n.4 (C.A. 8).

b. The trial court did not improperly amend the indictment. When presenting the indictment to the jury, it deleted therefrom certain of the alleged overt acts which related solely to a co-indictee, whose cause had been severed prior to trial. As this Court held in *Salinger* v. *United States*, 272 U.S. 542, 548-549, this action does not constitute an impermissible amendment of the indictment, provided (as was the case here) nothing is added.

5. Petitioner's additional claim that he was denied a speedy trial is also of little substance. The indictment in this case was returned on April 29, 1970; petitioner was arraigned on June 16, 1970; the case proceeded to trial on April 21, 1971; it concluded two days later. Between indictment and trial, pretrial discovery was being litigated (see Pet. 23). At no time during the approximately ten-month delay following arrest and arraignment did petitioner demand a speedy trial, nor did he once raise the issue in the trial court. Moreover, petitioner does not now point to any specifics in support of the conclusory allegation that he was prejudiced by the delay. Accordingly, this is not a case where the lapse of time prior to trial constituted reversible error. *Barker* v. *Wingo*, No. 71-5255, decided June 22, 1972.

6. Finally, petitioner contends that the F.B.I. recording of the telephone conversation he had with Croft violated his Fourth Amendment rights under *Katz* v. *United States*, 389 U.S. 347, and *Massiah* v. *United States*, 377 U.S. 201. Since the recording here preceded the return of the indictment, *Massiah*

is inapposite. Moreover, because the overhearing took place only after Croft had given his permission for the recording, the Fourth Amendment was not violated.[1] See *United States* v. *White*, 401 U.S. 745.[2]

---

[1] Nor was there any violation of 47 U.S.C. 605, as petitioner apparently argues. Since Croft consented to the government's recording of the conversation, there was no "interception" prohibited by the statute. See *Hudson* v. *United States*, 429 F. 2d 1311, 1312 (C.A. 5), certiorari denied, 402 U.S. 965.

[2] Petitioner's remaining contentions are of little substance. He ascribes as error the failure of the court to require the government to submit a formal response to his request for a bill of particulars. But the government made one of its principal witnesses (Garcia), who could supply substantially all of the requested information (Tr. 16-17), available to the defense prior to trial to be interviewed. Since the court determined that the defense already knew the theory of the government's case (Tr. 17G), and had ready access to the information it sought, it did not act improperly in declining to require a formal response to the request for a bill of particulars. See *Duncan* v. *United States*, 392 F. 2d 539, 541 (C.A. 9), certiorari denied, 391 U.S. 935.

Nor was it error for the trial court to permit the prosecution to propound certain questions to petitioner relating to his Mexican citizenship. The assertion that such questioning—which was limited to asking petitioner his nationality and whether he had the proper documents to remain in this country (Tr. 212-213)—was somehow prejudicial is without any factual support or explanation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

BEATRICE ROSENBERG,
GEORGE S. KOPP,
Attorneys.

SEPTEMBER 1972.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO. 72-156

JUAN POMPA ZARATE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

MORRIS LAVINE
215 West 7th Street
Suite 620
Los Angeles, Ca. 90014
(213) 627-3241

Attorney for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
NO. 72-156

JUAN POMPA ZARATE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Juan Pompa Zarate respectfully petitions for rehearing of the order of this Court of October 16, 1972 denying his petition for writ of certiorari. He petitions on the following grounds:

1. The Court has apparently overlooked or failed to consider the total insufficiency of evidence to establish his guilt of the charges, or any of them.

2. The Court has failed to consider and determine whether a defendant in a criminal case can stand convicted based solely on stipulation of the prosecuting attorney and defense attorney as to the

corpus delicti in the case.

3. The Court has failed to consider that the defendant was not confronted by the evidence against him or by an expert witness regarding the evidence and that the defendant did not at any time waive his constitutional rights of confrontation and did not consent personally to any waiver of this fundamental right.

4. The case is on all fours with Giglio v. U.S., 31 L.ed.2d 104, in that the United States Attorney trying the case failed to disclose to the Court that he intended to dismiss the cases against these witnesses after the trial was over. The witnesses did not disclose this evidence before the jury so that their credibility, or lack of it, could be determinated by the jury.

5. The defendant, having been asked by the prosecutor whether he was a Mexican citizen, which he answered in the affirmative, was thereby singled out for invidious treatment by the prosecutor and the government and denied equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Each of the foregoing questions is important in determining whether the defendant had a fair trial and a fair sentence guaranteed by the Fifth Amendment to the Constitution of the United States and were not ruled upon by this Court except as implicit in the denial of certiorari. We believe each of them merits this Court's full scale hearing and an order granting certiorari.

ARGUMENT

Petitioner is a Mexican citizen, residing in Los Angeles for many years. At no time has there been any evidence that he actually possessed or had conspired to possess amphetamines, barbiturates or marijuana.

On or about March 16, 1969 Dorve Robert Croft entered the United States from Mexico in an automobile and was stopped at the Border and apprehended for the alleged possession of marijuana.

On or about April 25, 1969 Robert E. Waggoner was stopped at the Border at the time he was entering the United States from Mexico with tablets alleged to be amphetamines.

On or about June 20, 1969 John Henry Garcia entered the United States from Mexico and was stopped at the Border in an automobile allegedly containing seconal capsules.

The indictment charged that these men entered into a conspiracy to violate Title 21 U.S.C. Sec. 176a.

At the trial, held in 1971, the three men claimed they were going to deliver the merchandise in their cars, the actual contents and substance of which they allegedly did not know themselves, to the defendant Zarate. There never was any proof by any expert or any knowledgeable person that the things removed from their automobiles were narcotics in violation of Title 21 U.S.C. Sec. 176a.

At no time was any narcotic or

amphetamine or barbiturate found in the possession of petitioner or any proof that he had ever conspired to receive them. The sole testimony was that of the alleged co-conspirators, who said they had been promised nothing by the government except to tell the Judge that they had cooperated, and no promise had been made that their cases would be dismissed. There was therefore no substantial evidence of any actual substance which anyone could say was a narcotic or a dangerous drug that was brought into Court for the petitioner or his counsel or his experts to examine. (Giglio v. U.S., 31 L.ed.2d 104)

Without his consent, petitioner was denied his Sixth Amendment right to confrontation by such evidence and the right to cross-examine any expert who might declare the substances were narcotics or dangerous drugs. No physical evidence was offered. (Bruton v. U.S., 391 US 123, 20 L.ed.2d 476; Sixth Amendment, U.S. Constitution)

One cannot cross-examine a stipulation, particularly of his own counsel.

There was no substantial evidence of conspiracy or of aiding and abetting. There was no proof of any possession, transfer, or sale of any items charged in the indictment. A conviction without evidence is a violation of due process of law. (Shuttlesworth v. Alabama, 382 US 87, 15 L.ed.2d 176; Thompson v. Louisville, 362 US 199, 4 L.ed.2d 654)

Uncorroborated testimony of the confessed perpetrators of a crime, inspired by hope of immunity from punishment which in this case has turned to glad fruition,

that the appellant was an instigator or a participator in the perpetration of his crime, is insufficient to establish guilt beyond a reasonable doubt and presents no substantial evidence of it. (Jahnke v. State, 68 Neb. 154, 104 NW 154,158; Sykes v. U.S., 204 F. 909)

An attorney cannot stipulate away the substantial rights of his client nor enter into a stipulation which is tantamount to pleading his client guilty. (People v. Davis, 48 Cal.2d 241, 256; People v. Rogers, 56 Cal.2d 301; People v. Holmes, 54 Cal.2d 442)

Injecting the petitioner's Mexican citizenship into the case was a drop of poison in the whole stream and fatally infected the verdicts and singled out the defendant for racial discrimination and thus invidious treatment, denying him the equal protection of the laws. (Graham v. Richardson, 403 US 365, 29 L.ed.2d 534, 544)

Alien citizens have the same privilege and benefits as is enjoyed by white citizens and are entitled to equal treatment in the courts. (Graham v. Richardson, 403 US 365, 377, 29 L.ed.2d 534, 545)

We pray for rehearing and reversal of the judgments.

Respectfully,

MORRIS LAVINE

Attorney for Petitioner